

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
UNITED STATES OF AMERICA, : 18-cv-06369-MKB-PK
Plaintiff, :
: U.S. Courthouse
- versus - : Brooklyn, New York
: July 1, 2019
: 12:02 PM
UBS SECURITIES LLC, et al., :
Defendants :-----X

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE PEGGY KUO
UNITED STATES MAGISTRATE JUDGE

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1 THE CLERK: This Honorable Magistrate Judge
2 Peggy Kuo presiding.

3 Civil Cause for a Motion Hearing, docket number
4 18-cv-6369, USA v. UBS Securities, LLC, et al.

5 Counsel, please state your name for the record,
6 starting with the plaintiffs.

7 MR. HAYES: Good morning, your Honor.

8 Richard Hayes, Assistant United States Attorney
9 for the United States, and together with me today are
10 colleagues from the Eastern District, as well as the
11 Northern District of Georgia, Mr. Castiglione, Michael
12 Castiglione, is next to me, Ms. Bonni Perlin, Mr. Austin
13 Hall, and Armen Adzhemyan.

14 MR. GIUFFRA: Good afternoon, your Honor. I
15 think it's the afternoon, your Honor.

16 Robert Giuffra with Sullivan & Cromwell for the
17 UBS defendants, and with me is my partner, Justin DeCamp,
18 Hillary Williams, and Phil Begler (ph.), who is not
19 admitted but I want to just put him on the record anyway.

20 THE COURT: All right. Good afternoon,
21 everyone.

22 So we are having this conference to talk about
23 a dispute with regard to discovery in which the defendant
24 is asking the U.S. government to preserve certain
25 documents.

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1 I will start with the document at 54 where
2 plaintiffs have asked for the reply to be stricken. So I
3 am just going to explain to the parties what my
4 procedures are.

5 My rules clearly stated that for discovery
6 disputes, there should be a filing of no longer than
7 three pages, which the parties complied with, and that's
8 great. And normally, I should let you know since this
9 litigation is likely to go on for a while, I will not
10 make a ruling on discovery without speaking to the
11 parties first. So there's really no reason to file
12 anything in addition because you should be making your
13 best case in those three pages, and if there's any
14 ambiguity or you need to respond, you should be -- I will
15 give you the opportunity to do so orally.

16 I don't want to encourage a situation where the
17 parties are just papering the Court with a lot of
18 filings. I will read them if you file them but it
19 doesn't do anybody any good to do that. Okay?

20 So in this case, I will deny the motion to
21 strike because it's the first time this has happened, and
22 I trust that it won't happen again in terms of asking for
23 leave to file something that's attached without asking
24 for leave first, and I will give the plaintiff the
25 opportunity to respond today with whatever arguments you

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1 want to make.

2 So let me see if I can understand what is
3 happening in this case. The defendants are asking that
4 there be a certain group or four different groups of
5 relevant documents at the Department of Housing and Urban
6 Development and Treasury to be produced and preserved.
7 They're alleging that the plaintiff has conceded that
8 that's -- it's all one big, happy federal government, and
9 I am understanding from the plaintiff they have not
10 conceded that. And so that's one of the arguments that
11 we're -- that I will consider today but let me try to
12 understand what's at issue ultimately in making that
13 choice.

14 So, Mr. Giuffra, let me find out from you what
15 difference does it make if this is a Rule 34 request or
16 whether you're making a -- whether you're serving a
17 subpoena to get the documents.

18 MR. GIUFFRA: Well, your Honor, we think if
19 serve a subpoena, number one, in terms of just
20 enforceability, a party has to respond to a subpoena.
21 Whereas with respect to a nonparty, in the case of the
22 government, it would only be the head of an agency.

23 In addition, there are obligations that go to
24 spoliation. If you're a party and you have documents and
25 you spoliate them versus a nonparty.

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1 We can also serve certain types of discovery on
2 a party. In this particular case, obviously we've gone
3 through the public record to try to find documents but
4 there may be a need to serve interrogatories, for
5 example, about audits that were conducted by HUD into the
6 same loan originators that UBS conducted due diligence
7 of.

8 There are also issues with respect to
9 admissibility in terms of admissions -- excuse me, not
10 admissibility, admissions under 801(d)(2). Obviously,
11 you know, statements made by a party are treated as
12 admissions. So is HUD a party is obviously an issue that
13 would be relevant.

14 And so when courts have looked at this issue,
15 and I can talk about it if you would like me to, I think
16 they've taken the position that in a civil case, you
17 know, the other side is calling them the United States of
18 America, not the Northern District of Georgia and the
19 Eastern District United States Attorney's Office. It's
20 the United States of America. And --

21 THE COURT: That's just the naming convention.

22 MR. GIUFFRA: Yes, but I think but not only is
23 it a naming convention, no but courts have recognized
24 that when you're dealing with non-independent agencies
25 like the SEC, they're treated as part of the plaintiff in

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1 a civil case.

2 The other side, when they -- in their
3 opposition papers, referenced a whole series of criminal
4 cases, and cases interpreting the criminal discovery
5 rules. Those rules have no bearing in a civil case,
6 which is what this is.

7 And when you actually look at the civil cases
8 that the other side cites, you know, we obviously rely
9 upon the AT&T case which is we think the leading case.

10 THE COURT: But what other cases are there,
11 other than AT&T from 1978?

12 MR. GIUFFRA: Well, in this circuit, United
13 States v. Amex is a second -- is a case from the Eastern
14 District which cited AT&T favorably and applied the
15 reasoning of AT&T.

16 THE COURT: But Amex was about the State
17 Attorney General's Office --

18 MR. GIUFFRA: Correct.

19 THE COURT: -- versus the State agency
20 controlled by the Governor.

21 MR. GIUFFRA: But I think the rationale
22 applies. And then we cited cases like Senkowski, which
23 is from the Southern District of New York, treating
24 departments of an executive branch is considered a single
25 party.

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1 Then if you just look at the cases that the
2 government cites --

3 THE COURT: Yeah, I know those are criminal
4 cases but I am looking for --

5 MR. GIUFFRA: No, but they also cite civil
6 cases. They cited two civil cases, one which is called
7 Deane, D-E-A-N-E, involving the Health and Human Services
8 Corporation from the Eastern District of Louisiana,
9 citing, in that case, permitted discovery of HHS.
10 Another case called Davis, permitting discovery against -
11 - involving the EPA.

12 And the two civil cases that the government
13 cites which is Texas v. Holder, the party was the
14 Attorney General, not the United States of America, and
15 then they cited an SEC case which is an independent
16 agency, and HUD and Treasury are clearly not independent
17 agencies.

18 So we think the reasoning and rationale of the
19 AT&T case is squarely on point, particularly here, given
20 the nature of what the government is seeking. This is a
21 case where the government is seeking -- claims billions
22 of dollars in losses on transactions we engaged in.

23 THE COURT: What I am looking for is any case
24 since AT&T that's on point for your side. I know you've
25 cited the Amex case. I've read it. I've told you why I

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1 think it's different. Is there any other case that
2 supports your position?

3 MR. GIUFFRA: I think I cited a case -- another
4 case would be Talavera v. Shah, that's a case dealing
5 with, you know, statements of USAID employees being
6 admissible as party admissions under Rule 801(d)(2)(D).
7 That's 638 F.3d 303 (2011).

8 THE COURT: Right, but it doesn't have to do
9 with what you're asking for here, which is a preservation
10 order to an agency.

11 MR. GIUFFRA: Well, I think it does in that --
12 but I think the AT&T case is directly on point. It's a
13 similar type case --

14 THE COURT: But I guess I hear you on that but
15 I am looking for some other court that has -- maybe
16 they're not published decisions but some other court that
17 has looked at AT&T since then and said yes, this
18 absolutely makes me issue a preservation order against an
19 agency other than the United States Attorney's Office or
20 whoever brought, well I guess in this case, let's call it
21 the Justice Department, okay? So against an agency other
22 than the Justice Department in an enforcement action like
23 this that's civil.

24 So it may be that there aren't any but --

25 MR. GIUFFRA: I think, your Honor, the Deane

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1 case that I mentioned --

2 THE COURT: All right.

3 MR. GIUFFRA: -- Deane v. Dynasplint Systems,
4 Inc., (2015) W.L. 1638022, Eastern District of Louisiana.
5 That's a false claim, civil case, by the United States
6 against the healthcare provider. The government sought
7 to produce documents that were in the possession of the
8 Center for Medicare and Medicaid Services, and from HHS.

9 And then the question was well what is the
10 scope of the custody and control of the government. And
11 does it exceed the Department of Justice because the
12 Department of Justice was acting as the counsel for the
13 government in that case.

14 And the government viewed the term, you know,
15 "you" to include -- I mean, not the government, the
16 judge, granted the party's motion, and said that the
17 government included the Department of Health and Human
18 Services, as well as --

19 THE COURT: Was that a case where the Justice
20 Department was acting as the lawyer for HHS and the
21 Medicaid/Medicare, or were they bringing --

22 MR. GIUFFRA: It was like this case, because in
23 a false claims act suit, the Department of Justice brings
24 a civil claim, just like it is bringing you a civil claim
25 under FIRREA in this case. So there's no difference --

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1 THE COURT: Okay.

2 MR. GIUFFRA: -- between the procedural posture
3 between the two cases, and it's also important to keep in
4 mind that in case, and I think it is -- we're not seeking
5 documents from the entire U.S. government. We're seeking
6 documents from HUD and Treasury, and both of those
7 agencies were part of the RMBS task force that was set up
8 by the government to look into the whole question of
9 whether there was, you know, misconduct with respect to
10 RMBS. And in other settlements, the government in press
11 releases has identified HUD employees as being involved
12 in the investigations.

13 Now I again don't think that, you know, whether
14 HUD is part of the investigation or isn't part of the
15 investigation is the controlling fact. I think the
16 controlling fact is that this is a civil case, it's not a
17 criminal case, and the idea that we should just put on
18 blinders, and say that, you know, it's only the documents
19 that the United States Attorney's Office's collect
20 because that's the position they've actually taken.

21 THE COURT: Well, I think it's the Justice
22 Department, right?

23 MR. GIUFFRA: No, they actually have --

24 THE COURT: Okay. Well, I will clarify from
25 them what they --

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1 MR. GIUFFRA: And I mean one of the things, and
2 this is not before the Court today but for the last four
3 or five months, we've been asking for documents that the
4 Department of Justice has collected related to RMBS, loan
5 originators that UBS dealt with, documents that related
6 to, you know -- in this case, one of the big issues is
7 that a number of the supposed defrauded investors, bought
8 UBS, RMBS, were themselves sued by the Department of
9 Justice, and at least -- and would have been
10 investigated, as well.

11 So the government is taking the position that
12 well, to the extent that we didn't rely on those
13 documents to file our complaint, we're not going to give
14 you access to them.

15 THE COURT: We meaning the government?

16 MR. GIUFFRA: Yes.

17 THE COURT: Okay. So they're taking the
18 position in a civil case that their discovery obligations
19 are only -- are limited to the Eastern District of New
20 York, and the Northern District of Georgia, and they're
21 taking the position that well, if they accessed other
22 documents collected by the Justice Department, and they
23 looked at them to do their complaint, they'll give us
24 access to them, but that's not the way discovery works in
25 a civil case.

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1 Clearly, they're looking for inculpatory
2 documents. We're looking for exculpatory documents. And
3 to the extent documents were collected by other parts of
4 the Justice Department relating to UBS, these RMBS
5 transactions, parties that we dealt with, originators
6 that we dealt with, those documents need to be looked at.

7 THE COURT: Um-hum.

8 MR. GIUFFRA: So that's not the issue before
9 the Court today. The issue before the Court today is
10 really the question of whether, you know, documents
11 related to HUD and Treasury should be looked at. And one
12 of the things that happened in this matter was we had
13 multiple meet and confers. We thought they had conceded
14 that HUD and Treasury were part of the United States. We
15 wrote, you know, three letters.

16 THE COURT: Well, I mean part of the plaintiff.

17 MR. GIUFFRA: Part of the plaintiff, and they
18 never responded to the letters, but the letters certainly
19 took that position. They now, you know, in their
20 opposition letter to our motion to compel, took a
21 different position, fine, that that can happen.

22 THE COURT: Well, I would suggest that the
23 parties communicate better in that instance. I don't
24 think that especially at this early stage, a failure to
25 respond to a particular point is an admission. I don't

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1 think that's a good way to litigate a case.

2 MR. GIUFFRA: And we wrote three letters. And
3 they never wrote back, and said that our understanding
4 was wrong. But I think the bigger point is this dispute
5 has been going on for at least three months. And when
6 the plaintiff asked us, well, what's the basis for your
7 reasoning that you think that HUD and Treasury has
8 documents, we -- you know, we provided them, and I am
9 happy to give the Court, we have a list -- we have a
10 whole packet of documents that we've gotten from just
11 public materials, that we think are directly relevant to
12 the issues in this litigation.

13 I mean one of the most important issues is that
14 the Federal Housing Administration provide an assurance
15 to Countrywide, and a number of other loan originators,
16 and that insurance was only given pursuant to -- you
17 know, they had to do certain analysis to determine
18 whether originators were proper originators or not.

19 One of the allegations in the complaint is
20 that, you know, UBS falsely told investors that it only
21 dealt with reputable originators. Well, the originators
22 that UBS was dealing with were the same originators that
23 the plaintiff through HUD was dealing with. And so I
24 think at a trial, the fact that HUD was insuring, and
25 auditing the same originators that UBS was dealing with

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1 is highly relevant.

2 In addition, I think this is, you know, I think
3 very important evidence. HUD was doing audits for
4 purposes of this FHA insurance of, for example,
5 Countrywide. Countrywide provided the loans for 14 of
6 the 45 -- 40 RMBS transactions that are at issue in this
7 case. HUD was doing, you know, its audits. It was
8 looking at loans at bank branches and the like, and they
9 were seeing some defects and problems, missing documents,
10 and they were still concluding that for purposes of HUD,
11 these originators were complying with HUD guidelines.

12 Well -- and in fact, in doing the HUD audits,
13 HUD was looking at loans that they thought were the less
14 good loans. Well, that's exactly what UBS did, yet the
15 plaintiff is accusing UBS of fraud for doing due
16 diligence based on sampling, looking at adversely
17 selected loans, determining that even though there were
18 some poorly -- you know, some loans that were missing
19 documents and other issues, that that wasn't evidence
20 that UBS made a -- knowingly made a false statement to
21 investors when it said that these loans were done in
22 accordance with underwriter guidelines.

23 So, you know, that's just one example. There's
24 -- I could go on, and on, and on to give you examples of
25 why we think the publicly available documents that we

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1 found that HUD and Treasury have, are directly relevant
2 to the allegations of this complaint.

3 THE COURT: Okay. So if you have those
4 publicly available documents, what exactly are you
5 looking for that is not public.

6 MR. GIUFFRA: Well, obviously that's -- we
7 think that's just the tip of the iceberg, and obviously
8 there must be other documents within HUD that go beyond
9 the documents we found within HUD that relate to these
10 mortgage originators and HUD audits of those mortgage
11 originators in addition.

12 One of the arguments that the plaintiff makes
13 in this case is that somehow UBS is literally responsible
14 for the financial crisis and the government has done
15 analysis of causes of the financial crisis.

16 THE COURT: Right, and I'm looking at your
17 group category four, treasury analysis of the causes of
18 the financial crisis, so you're -- I guess I am not sure
19 what exactly you're seeking here.

20 MR. GIUFFRA: What we're saying, your Honor, is
21 we would like to have the opportunity to meet and confer
22 with the government, and discuss the scope of a
23 reasonable, and proportionate document collection, and --
24 will saving and then maybe production, and then
25 production exercise.

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1 What the government is saying or the plaintiff
2 is saying in this case is they have no obligation to go
3 beyond the Eastern District of New York and the Northern
4 District of Georgia in terms of, you know, producing
5 documents to us.

6 THE COURT: Okay. So --

7 MR. GIUFFRA: And the --

8 THE COURT: -- all your -- that's why when you
9 just said that, I heard something different. You're just
10 asking for the opportunity to meet and confer and come up
11 with some document requests. You're not actually making
12 these requests now.

13 MR. GIUFFRA: Well, first we want to deal with
14 preservation. Right now, they're taking the position
15 they don't even have to preserve the documents.

16 THE COURT: Well, but preservation already
17 requires identification of at least the scope of the
18 preservation.

19 MR. GIUFFRA: That is --

20 THE COURT: So what is the scope of the
21 preservation you're seeking?

22 MR. GIUFFRA: Well, your Honor, we had
23 identified in our May 7th letter, which I think was
24 appended to the materials we gave the Court. That would
25 be Exhibit 5 to our original motion to compel.

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1 And in that document, if --

2 THE COURT: I'm trying to find it now. I'm
3 looking at your motion to compel, which is document 45.

4 MR. GIUFFRA: Yes.

5 THE COURT: And where is the May 7th letter?

6 MR. GIUFFRA: 45-5, it is.

7 THE COURT: 5. Okay. So this is the scope of
8 the preservation --

9 MR. GIUFFRA: And so what we have done in an
10 attempt to try to be -- you know, to try to be as
11 specific and as particularized as possible, I think it's
12 important to remember, the government was able in this
13 case to go out and send subpoenas to whomever they wanted
14 for four years before they brought this case. This is
15 our first opportunity to gather evidence.

16 And so what we've done is we've particularized
17 from pages 3, all the way to 10, the types of documents
18 that we're interested in. We even identify in footnote 2
19 in this letter, particular human beings; you know,
20 regional inspector general for audit-Boston, regional
21 inspector general for audit-New York, Philadelphia, and
22 on and on, particular human beings that we have been able
23 to identify who we think are likely to have relevant
24 documents for purposes of this case.

25 THE COURT: Okay. So on page 3, you say these

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1 are only examples. So is this the scope of what you're
2 seeking to preserve?

3 MR. GIUFFRA: Obviously, we don't know the full
4 extent of what the government has. We're doing this sort
5 of in a backwards way. Normally, you serve a discovery
6 response, and you ask for particular categories of
7 documents, and then there's a process.

8 What we're doing is we've gone above and beyond
9 that. We've actually, you know, gone through publicly
10 available information, found documents that we think are
11 relevant, and we're saying these are the types of
12 documents that we think are responsive to our broader
13 request, and let's -- and can you number one, preserve
14 them, and number two, produce them.

15 THE COURT: Okay. But again, I'm just trying
16 to understand what exactly you're asking for. If these
17 are only examples, then you're asking them to preserve a
18 lot more than you've enumerated.

19 MR. GIUFFRA: No, these are what we know of.

20 THE COURT: Okay. But --

21 MR. GIUFFRA: And so this would be a first step
22 in terms of what we think that should be preserved in
23 this case.

24 THE COURT: Okay. So you're saying that --
25 when you say only examples, you mean that you'll give

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1 further examples at a later date.

2 MR. GIUFFRA: Or if they produce documents to
3 us, and then we see oh, that they're -- that's a place
4 that you can go.

5 THE COURT: Right. But you're not asking them
6 to preserve something that you don't know.

7 MR. GIUFFRA: No, not at all.

8 THE COURT: All right.

9 MR. GIUFFRA: And I think that's important.
10 We've tried to be specific. So for example, your Honor,
11 on this whole question of, if you look on page 4, we talk
12 about HUD's FHA insurance program. There's no dispute
13 that HUD insured lenders against losses on mortgages.
14 The lenders that were insured included Countrywide.
15 Countrywide was a large loan originator. It was an
16 originator that government agencies dealt with, and in
17 order to get that insurance, they had to participate in a
18 certification process that was governed by HUD, and HUD
19 had all these inspectors who were out looking at
20 Countrywide loans.

21 And in our view, at the same time UBS was doing
22 due diligence of Countrywide loans, HUD inspectors were
23 looking at Countrywide loans, and continuing to allow
24 those loans to be subject to --

25 THE COURT: So if HUD says they're okay, then

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1 they're okay.

2 MR. GIUFFRA: Well, I think that's certainly
3 evidence that would be something that in a trial, you
4 would want to present to a jury. And obviously, you
5 know, this whole question about is an admission, I think
6 it obviously matters that if the plaintiff includes HUD,
7 we would say well HUD did audits of Countrywide, we did
8 audits of Countrywide. HUD did not see any reason not to
9 continue FHA insurance for Countrywide.

10 THE COURT: So you're saying those things match
11 up or that this is just additional evidence to bolster
12 your client's position that things are okay?

13 MR. GIUFFRA: I --

14 THE COURT: And I am just trying to figure out
15 because the audits could be done in a different way.
16 They could be looking for different things, insurance
17 coverage is maybe --

18 MR. GIUFFRA: Your Honor?

19 THE COURT: -- a different standard from
20 liability in this case.

21 MR. GIUFFRA: Your Honor?

22 THE COURT: I'm just trying to figure out how
23 you're saying it would match up.

24 MR. GIUFFRA: Okay. It certainly goes to
25 scienter, which is, you know --

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1 THE COURT: Your client's scienter?

2 MR. GIUFFRA: Yes, I think so, because if they
3 don't --

4 THE COURT: Does your client know about the
5 audits that FHA did?

6 MR. GIUFFRA: But if you had government lawyers
7 or government investigators or audit-type people, who are
8 doing due diligence for purposes of FHA insurance in
9 exactly the same way, or in the similar way to the way
10 UBS was doing due diligence, and the plaintiff is
11 accusing UBS of engaging in fraud, and we're coming to
12 the same conclusions at the same moment in time, I think
13 that's evidence that a jury would want to hear.

14 THE COURT: But that doesn't go to scienter.

15 Scienter would only be if your client knew about it. If
16 your client knew about these government audits and relied
17 on it, then maybe there's an argument to be made, in
18 which case your client already knows about it.

19 MR. GIUFFRA: No, it would --

20 THE COURT: But if the client didn't know about
21 it, how does it touch on their scienter?

22 MR. GIUFFRA: It would because if the
23 government was concluding -- they were looking at these
24 while --

25 THE COURT: They happen to come to the same

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1 conclusion is not scienter.

2 THE COURT: But the evidence is obviously not
3 direct but the point is that if the government is doing
4 an audit, looking at specific loans, and seeing that some
5 of those loans, for example, are missing documents or
6 have certain deficiencies but concluding that
7 nevertheless, Countrywide's loans satisfy HUD guidelines,
8 we think that's --

9 THE COURT: For insurance.

10 MR. GIUFFRA: For insurance. We think that's
11 relevance in terms of whether when UBS was doing due
12 diligence of HUD, UBS looking at and finding errors in
13 the loans, understood that, you know, maybe that there
14 wasn't an issue, and the representation that's at issue
15 in the case, which is whether those loans comply with
16 Countrywide's guidelines for originating those loans, was
17 knowingly false.

18 In addition, if --

19 THE COURT: But again, I'm still not sure how
20 it touches on scienter. If your client didn't know about
21 what FHA was doing, how could there be any issue of
22 scienter. They happened to be doing things separately.
23 The way you described it, they're doing things
24 separately. They just happen to come to the same
25 conclusion, so --

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1 MR. GIUFFRA: Because the government's theory,
2 and I would be happy to hand up our motion to dismiss,
3 they don't name particularly human beings at UBS who they
4 say had fraudulent intent.

5 What they say is --

6 THE COURT: So only human beings can have
7 fraudulent intent, not a company?

8 MR. GIUFFRA: Well, in fact, the law is you do
9 need to have a human being that has fraudulent intent,
10 and it's not just something you just sort of amorphously
11 point to a company at large.

12 But what they do is well, they say the due
13 diligence results that UBS obtained showing that there
14 were defects in these loans caused -- not negligence,
15 that you made a mistake, but put UBS on in the view that
16 it knew if it went forward, included some of these others
17 -- included other loans, not even the loans that were
18 looked at, in these RMBS transactions, that that
19 confirmed that UBS or established that UBS had fraudulent
20 intent, which is a pretty high standard.

21 So they're looking at the actual due diligence
22 process and what you did with the results from the due
23 diligence process, in making the argument that they --
24 that how UBS handled the due diligence process, and dealt
25 with loans that had defects, that were not included --

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1 the defective loans were not included in the overall --
2 were not included in these transactions but they're
3 inferring from that, that UBS should have known that or
4 knew -- because should have known is a negligence
5 standard, knew that the loans that are actually included
6 in the loan pools were defective, and therefore that the
7 representation was made in a knowingly false way.

8 So our point is the fact that HUD was doing
9 audits and in coming to the conclusion that whatever
10 errors it was finding, using a similar methodology and
11 doing sampling, and looking at adverse loans, and
12 concluding that these originators still complied with HUD
13 guidelines is relevant.

14 Because if the plaintiff in a case is doing
15 exactly what the defendant is allegedly doing, and the
16 way the defendant did it was fraudulent, that certainly
17 is something you would want the fact-finder to know. And
18 the government is saying no -- and again, you have -- the
19 thing about this case is this is the first one of these
20 cases that's actually ever been litigated, which is why
21 you're sort of, you know, dealing with it on a clean
22 slate but, you know, that's --

23 THE COURT: But the other cases have not gone
24 through discovery?

25 MR. GIUFFRA: No.

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1 THE COURT: No. All right. Okay.

2 MR. GIUFFRA: Not the similar -- not the FIRREA
3 cases, anyway, but then so your Honor, if you look at
4 what we're talking about -- another argument the
5 government makes --

6 THE COURT: Okay.

7 MR. GIUFFRA: -- is that --

8 THE COURT: So can I just pause there because I
9 would like to give the government an opportunity to
10 speak, and then I will get back to you, all right?

11 MR. GIUFFRA: Yeah.

12 THE COURT: So Mr. Hayes, why don't you tell me
13 first, is it your client's position that the discovery is
14 limited to the Northern District of Georgia and the
15 Eastern District of New York, United States Attorney's
16 Offices?

17 MR. HAYES: Good afternoon, your Honor. I
18 think I started off with morning, not an auspicious
19 start, and I didn't mean to suggest that your Honor
20 hadn't had a full day up to this point.

21 The short answer to your question is yes, your
22 Honor, and if I may, there are -- Mr. Giuffra has made a
23 number of points, and I would like to address --
24 elaborate on that point, and address some other points.

25 First, Mr. Giuffra cited the Deane case. I

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1 don't know whether that's in UBS's unauthorized reply, or
2 whether it's in UBS's initial letter, but it makes no --

3 THE COURT: I don't see it in the initial
4 letter.

5 MR. HAYES: It makes no difference, your Honor.
6 It actually is a FOIL and served to set in relief the
7 irrelevancy of the documents that UBS is seeking. In
8 that case, a United States government program was a
9 victim, as is always the case in a false claims act case.

10 This case is nothing like that case. The
11 United States is not seeking damages in this case. And
12 to get specific, it is not seeking any relief on the part
13 of HUD, any relief on the part of the Treasury.

14 In fact, your Honor, there are approximately --
15 UBS securitized approximately 160,000 loans in the forty
16 deals at issue in this case, 100 -- nearly 160,000 loans,
17 not one of which was insured by HUD. Not a single one of
18 those loans is a government program loan.

19 THE COURT: Okay. So it sounds like people are
20 saying different things, and I don't want to get too into
21 the weeds about this. Mr. Giuffra said that the
22 insurance was of Countrywide, not of the specific loans.
23 And you're saying --

24 MR. HAYES: That is --

25 THE COURT: -- that loans had to be insured --

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1 MR. HAYES: Yeah.

2 THE COURT: -- separately.

3 MR. HAYES: There's no insurance at issue in
4 this case. There's no HUD insurance at issue in this
5 case. Not one of the nearly 160,000 loans securitized by
6 UBS in the forty deals at issue in this case is an FHA
7 insured mortgage.

8 There's an entire huge government program
9 called the "Direct Endorsement Program." It's a HUD
10 program. It has myriad regulations and handbooks
11 associated with it. It is, in fact, is fascinating that
12 UBS cites a single audit of ten loans from one branch of
13 Countrywide in 2007. When one thinks about the millions
14 at Countrywide -- and this is -- the Court can take
15 judicial notice of this. The millions of loans that
16 Countrywide originated, they're pointing to a document
17 that concerns ten loans, in connection with a program
18 that is completely unrelated to anything in this case at
19 all.

20 And to make it even clearer, the government has
21 recovered approximately \$2 billion in false claims act
22 recoveries from Countrywide and Bank of America in
23 connection with fraud committed by those entities on the
24 government.

25 None of that should be at issue in this case

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1 but if it were, the government would say that Countrywide
2 was a bad originator, and the difference here, your
3 Honor, is not so much what -- whether Countrywide was a
4 bad originator of loans, but what UBS said to its
5 investors about Countrywide. Those are two very
6 different things, your Honor.

7 THE COURT: Okay. So can we get back to the
8 issue in this case 00 in this proceeding, which --

9 MR. HAYES: And I apologize, your Honor, but
10 that goes to the relevancy which is a fundamental
11 question regardless of what the scope of the government
12 is, and whether they can get --

13 THE COURT: Yes.

14 MR. HAYES: Right.

15 THE COURT: Okay.

16 MR. HAYES: But the Deane case is about --

17 THE COURT: Yes, I understand that.

18 MR. HAYES: Yes.

19 THE COURT: So let me pose the same question
20 that I posed to Mr. Giuffra a moment ago. Are there
21 cases that you can cite -- civil cases, not criminal
22 cases, post AT&T, that go the other way?

23 MR. HAYES: We cited whatever cases we could
24 find, your Honor.

25 THE COURT: Okay. So for some reason, there's

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1 a paucity of written decisions in this area.

2 MR. HAYES: Yes, your Honor, there's a paucity
3 because courts understand that when the United States
4 brings a case, when it's not bringing the case as a
5 victim but on behalf of others, which can be done civilly
6 as well as criminally, it's really not a question.

7 THE COURT: Well, are you -- so maybe I should
8 ask you since you've brought up that distinction, are the
9 United States Attorney's Offices bringing this on behalf
10 of agencies, the --

11 MR. HAYES: No, your Honor.

12 THE COURT: They're bringing it on their own,
13 as a --

14 MR. HAYES: Yes, your Honor.

15 THE COURT: -- freestanding enforcement action.

16 MR. HAYES: And if we can. And I recognize,
17 your Honor, I apologize for this that some of this will
18 be representations to the Court which depending upon the
19 Court's need, we can paper those things -- these
20 representations up, but this is not a case brought on
21 behalf of HUD. There are no HUD loans. This is not a
22 case brought on behalf of Treasury.

23 Mr. Giuffra referenced -- suggested that there
24 was a press release or maybe more than one press release
25 in which the government, presumably I guess he was

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1 referring to this case, perhaps he wasn't but in any
2 event --

3 THE COURT: Well, there is a press release
4 attached.

5 MR. HAYES: -- there's no press release
6 referring to HUD concerning this case.

7 THE COURT: Okay.

8 MR. HAYES: There's no press release concerning
9 this case concerning HUD.

10 THE COURT: But I think Treasury was part of
11 this.

12 MR. HAYES: It was not, your Honor.

13 THE COURT: No?

14 MR. HAYES: There's a reference to the
15 Inspector General for the FHFA. The FHFA is a quasi-
16 independent agency that brought its own lawsuit against
17 UBS, which UBS settled and FHFA brought that suit, and it
18 wasn't the FHFA OIG that brought that suit, FHFA brought
19 that suit through private counsel.

20 With respect to -- look, there's been a
21 reference to some suggestion -- there's been some
22 suggestion, and if I can take 30 seconds to address this
23 that the government has waived or misled UBS in
24 communications.

25 The first thing, and Mr. Giuffra wasn't on this

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1 conference call, Mr. DeCamp was, the first thing we said
2 with respect to the scope of executive branch discovery,
3 which is incredibly broad -- if one looks at the
4 definition of executive branch or government in this
5 case, it's everything.

6 And the first thing we said, and perhaps I was
7 a little bit impolite, I said make a motion. That's the
8 very first thing we said.

9 Now that said, we reconsidered because we're
10 supposed to try to work these things out, and that will
11 continue to be the government's approach to things.

12 But that said, we went to HUD, and we went to
13 Treasury. And by the way, UBS went directly to HUD and
14 Treasury. There's an April 22nd letter that is addressed
15 to my office but is also specifically copied to Treasury
16 and to HUD.

17 And UBS served a subpoena on HUD. So the
18 record here is a little bit more complicated with respect
19 to how UBS viewed the government, at least procedurally.
20 We think this kind of procedure doesn't matter a whole
21 lot. The question is what's the law? And the government
22 certainly hasn't waived.

23 The fact that we've tried to revisit our
24 initial flat-out denial that they're entitled to broad
25 government discovery here doesn't mean that we have

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1 ultimately waived our position, that there isn't just one
2 government that the Department of Agriculture or
3 whomever, because no matter what has been said here
4 today, the request, and the document request, and the
5 letters that have been submitted to the government make
6 it clear that the proposed discovery, and the proposed
7 litigation hold, is not limited to just HUD and Treasury.

8 The government is supposed to figure out, the
9 Northern District of Georgia, and the Eastern District of
10 New York is supposed to figure out, we're supposed to
11 divine what it is that UBS wants from the government.
12 And we did speak to HUD and Treasury. We did do that as
13 we would speak to any agency that had received
14 hypothetically a subpoena, in this case, a direct letter
15 overture.

16 And we asked well, can this be done? Can you
17 figure out from what UBS has provided to us, and we've
18 provided all of UBS's letters to these agencies -- to
19 these two departments, can you figure out what is it
20 they're looking for? And the answer is no, we can't
21 figure out what we're looking for.

22 And by the way, we had nothing to do with the
23 forty securities at issue or any of the loan, the nearly
24 160,000 loans at issue. Your Honor has already had
25 expressed the Court's views concerning the relevance to

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1 this discovery, this one audit, or indeed any audit that
2 could have been performed by HUD or frankly Treasury or
3 any other government agency.

4 This case is about the representations made to
5 investors. If the government hypothetically knows that
6 there's a bad actor out there, which it eventually came
7 to learn, and settled with Countrywide in 2012, and 2014,
8 but if the government has come to learn that there's a
9 bad actor out there, that doesn't mean that UBS isn't a
10 bad actor too.

11 And again, the HUD program at issue, any
12 Treasury program has nothing to do with this case, and
13 one can only imagine what a burden it would be for the
14 district court if we were to have evidence concerning the
15 HUD direct endorsement program whereby first-time
16 homeowners, and those who have been foreclosed
17 traditionally through discrimination, for example, from
18 entering the housing market, have received insured
19 mortgage loans, how that would have anything to do with
20 this case, and do anything but obfuscate what's at issue
21 in this case.

22 Frankly, the government will make whatever
23 motion in limine at trial it needs to make. But in the
24 meantime, the discovery that is being proposed here, well
25 your Honor is aware that UBS has suggested that there

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1 could be a 100 or 200 -- I forget the exact number of
2 depositions, but this is the reason why, because they're
3 proposing to take discovery from HUD, proposing to take
4 discovery from Treasury, proposing to take discovery from
5 whatever agency touched housing policy, touched mortgage
6 policy, touched any of these originators, when none of
7 that has anything to do with the representations that UBS
8 made to its investors.

9 If HUD knew, Treasury knew, Agriculture knew,
10 NASA knew, that Countrywide was a bad originator, well
11 then the question is not so much whether the government
12 knew, but what did you UBS knew, and what did UBS tell
13 investors. And that's what this case is about, with all
14 due respect.

15 There's been some discussion here about this
16 application being limited to a hold. We have not
17 understood that. We've understood this is a motion to
18 compel documents.

19 And the -- and there's also, your Honor, if I
20 can just shift gears for a second because frankly we're
21 disappointed that UBS is bringing up a matter that has
22 not been subject to final meet and confer, but that's not
23 the first time that has happened. The last time it
24 happened concerns loans that are at issue in this case,
25 that are in UBS' possession, and the government is now

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1 going to the sources of those loans, the originators of
2 those loans, to get those loans, even though UBS has
3 that.

4 That was brought up to your Honor in the last
5 conference without a meet and confer. Today, without a
6 final meet and confer, UBS has brought up what can
7 certainly be correctly characterized as a planet-sized
8 issue. And that is, the 106 terabytes of documents
9 obtained by many United States Attorney's Offices in
10 investing -- in investigating UBS' competitors. 106
11 terabytes is approximately two-thirds of the entire
12 volume of all material in the Library of Congress.

13 A quick Google search shows that that is 50,000
14 trees worth of documents. All right? We investigated
15 and settled the case for billions of dollars against
16 Citibank. We investigated and settled a case against
17 Deutsche Bank for billions of dollars. We investigated
18 case against Credit Suisse and settled it for billions of
19 dollars. We can go on.

20 Every single -- any bank issuing RMBS has been
21 investigated by -- of any significance, has been
22 investigated by the United States. And they've all
23 settled by the way but what is the relevance of those
24 documents to these case -- this case.

25 Now that is not before your Honor. The only

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1 reason why the government has brought that up is because
2 Mr. Giuffra chose to bring that up today. Now we can
3 perhaps have that meet and confer before your Honor or we
4 can do what we're supposed to do, which is to finish that
5 meet and confer between the parties, and then bring any
6 dispute to the Court.

7 There are a few other issues, your Honor.

8 THE COURT: Well, I want to stay focused on
9 what's before me today. So there are a couple of ways I
10 can go about this. My -- I guess the first thing is an
11 observation which is one of the things I said earlier on,
12 which is I am disappointed that the communication between
13 the parties is not better. That the defendant would take
14 some silence to be a concession or a waiver, does not
15 seem, as I said earlier, the way to litigate a case.

16 The fact that Mr. Hayes, you feel the meet and
17 confers did not take place or were not complete, is also
18 disappointing to hear because I think the parties should
19 be trying to work these things out.

20 I don't think the parties, or at least one
21 side, and you won't know which one, will be disappointed
22 if you make me make the decisions for you. You know your
23 case better -- your respective cases better than I, and
24 so whatever decision I make, even if I think I am right
25 based on what I know, and what I am hearing, and seeing,

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1 is going to disappoint one or the other of you.

2 So you really don't want me to have to make
3 those decisions. So to the extent you can work things
4 out, that is a better course for you going forward.

5 MR. GIUFFRA: We agree 100 percent, your Honor,
6 and we've been trying to do that.

7 THE COURT: Okay. So well, for whatever
8 reason, you both don't seem to be meeting. So maybe I
9 should just adjourn this conference and let you stay in
10 this courtroom, and work things out, and talk some more,
11 and I'll come back in an hour, and you can tell me what
12 you've been able to thrash out. Is that how I should
13 proceed? I don't understand why there's a disagreement
14 about the degree of communication that's happening
15 between the parties.

16 MR. GIUFFRA: Your Honor, I think the main
17 issue we have today is whether the government should have
18 to preserve certain documents that HUD and Treasury have.
19 That's the issue that we are here about. And --

20 THE COURT: So as far as the meet and confers,
21 what -- so Mr. Hayes, what is it that you have been able
22 to thrash out before today that is necessary for today's
23 hearing.

24 MR. HAYES: Actually, your Honor, and I
25 apologized if I suggested that the issue of executive

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1 branch discovery has not been conferred about because we
2 think it has.

3 THE COURT: Okay.

4 MR. HAYES: The --

5 THE COURT: So for this issue, you've already
6 met and conferred.

7 MR. HAYES: We believe so.

8 THE COURT: So then let's proceed with today's
9 hearing, and then after this, I would urge the parties to
10 stay and talk about any other issues you may have.

11 MR. HAYES: And if I -- just thirty seconds,
12 your Honor, the only thing that the government would ask
13 is that -- and your Honor indicated and perhaps we
14 misheard, that your Honor had looked at, and read, I
15 think it's the June 7th unauthorized reply.

16 And if arguments made in writing, and the cases
17 cited there would be outcome determinative of this issue
18 today, the government would ask if it could in writing,
19 brief that.

20 THE COURT: Okay. So this is what I am going
21 to do today.

22 MR. GIUFFRA: Your Honor, can I respond to the
23 arguments he made because he misstated a number of
24 things.

25 THE COURT: Are they important to know --

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1 MR. GIUFFRA: I think so.

2 THE COURT: -- for today's proceeding?

3 MR. GIUFFRA: I think so.

4 THE COURT: All right.

5 MR. GIUFFRA: First, you know, again, we would
6 agree to limit the hold, just so we're clear about it, to
7 the HUD -- to HUD and Treasury, and the documents we
8 identified in the May 7th letter, which are highly, you
9 know, particularized and identified.

10 Number two, he's suggested that the money that
11 they're trying to seek is going to some nebulous party.
12 It's going to the United States Treasury as a penalty.
13 It's not going to investors in these RMBS, which were
14 highly sophisticated entities. He mentioned the FHFA
15 case. That was not a fraud case. That was a strict
16 liability case.

17 He mentioned service of a subpoena on HUD and
18 Treasury. That was done inadvertently, and we called
19 them up as we were doing the 300 subpoenas that we sent
20 out, it was to preserve documents. It was inadvertently
21 included in that.

22 But I think the bigger point, your Honor, and
23 if you would like, I could give the Court, this goes
24 through the documents and actually goes through the
25 relevant allegations that they make and shows why the

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1 documents are relevant.

2 THE COURT: The documents of what?

3 MR. GIUFFRA: The documents that we would like
4 to have preserved that are at HUD, and Treasury.

5 THE COURT: Okay. So I --

6 MR. GIUFFRA: And so the --

7 THE COURT: What is that?

8 MR. HAYES: Your Honor, we don't know what this
9 is.

10 THE COURT: Yeah, I don't either.

11 MR. GIUFFRA: I'm going to give both of you it.
12 It's --

13 THE COURT: Well, tell me what it is for the
14 record.

15 MR. GIUFFRA: It's examples of HUD and Treasury
16 documents that we --

17 THE COURT: On the public record.

18 MR. GIUFFRA: -- on the public record, and it
19 excerpts on the center of the document, and what the
20 document is. And on the right-hand side, it quotes the
21 allegations of the complaint that we think it's relevant
22 to.

23 THE COURT: Okay. So I will just consider
24 this --

25 MR. HAYES: Your Honor, we have never seen

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1 this.

2 THE COURT: Yeah, I know.

3 MR. DECAMP: Your Honor, if I may?

4 THE COURT: And I am not going to consider this
5 document. I am just receiving it.

6 MR. DECAMP: If I may just explain, your Honor,
7 what that is. The letters that we included --

8 THE COURT: So Mr. Giuffra didn't explain it
9 adequately?

10 MR. DECAMP: I mean the letters --

11 THE COURT: It is what it is.

12 MR. DECAMP: The letters that we attached to
13 the Court, we didn't want to burden the Court, they were
14 exhibits to the letters that we had given to Mr. Hayes.
15 So Mr. Hayes has seen these documents. He can't profess
16 not to have seen them before.

17 THE COURT: I don't think he's professing not
18 to have seen the documents. He didn't know what the
19 documents were he was being handed.

20 MR. DECAMP: What we have done is we've -- this
21 is a compilation of exhibits to the meet and confer
22 letters. We didn't attach all of the exhibits, the
23 materials that we gave to the Court. So therefore it
24 needs to be -- this is a way for the Court to basically
25 look at everything.

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1 So for example, if you look on Countrywide,
2 okay, which is --

3 THE COURT: So this document does not have a
4 cover page. It just has "Examples of HUD and Treasury
5 Documents", that is the title.

6 MR. DECAMP: Correct.

7 THE COURT: K.

8 MR. DECAMP: And --

9 THE COURT: So I am just going to have it
10 marked as an exhibit for today's purposes, Defendants'
11 Exhibit 1.

12 (Defendants' Exhibit marked for identification.)

13 MR. HAYES: And your Honor, we don't have
14 these --

15 THE COURT: I know that. You have --

16 MR. HAYES: -- this work product description,
17 your Honor.

18 MR. GIUFFRA: That's true, they don't. They
19 don't have that.

20 THE COURT: You have a copy of it now. I am
21 not going to make any decisions based on it today because
22 I have not seen it either.

23 MR. HAYES: Thank you, your Honor.

24 THE COURT: So Mr. Giuffra, what did you want
25 to say about this?

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1 MR. GIUFFRA: The point I am making, if your
2 Honor would just cite one example, which is the
3 Countrywide example, which I think Is an important one.

4 THE COURT: What page are we talking about?

5 MR. GIUFFRA: This is on page 2.

6 THE COURT: Tab 2 or Page 2?

7 MR. GIUFFRA: Page 2.

8 THE COURT: All right.

9 MR. GIUFFRA: It's just a summary.

10 THE COURT: There are items 4, 5, 6, and 7.

11 MR. GIUFFRA: Yeah, so item 5.

12 THE COURT: Okay.

13 MR. GIUFFRA: The allegation in the complaint
14 at paragraph 201 to 203, and obviously a defendant is
15 entitled to seek discovery in order to meet the
16 allegations of a complaint.

17 The allegations of the complaint are that we
18 "contradicted its representation -- UBS contradicted its
19 representations" when it "purchased and underwrote -- or
20 underwrote thousands of loans from" originators such as
21 Countrywide, and "represented" that UBS "only dealt with
22 reputable established originators."

23 Now there's no question if you look further in
24 the complaint that for thirteen of the forty are UBS, UBS
25 dealt with Countrywide. Well, the reason why we need the

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1 additional documents reflecting HUD's interactions with
2 Countrywide is because HUD approved Countrywide for FHFA
3 insurance. They did their own, as it says here, they
4 were annually recertified. They're subject to onsite
5 evaluations, subject to reviews of individual loans, and
6 if you just look at the next allegation in the complaint,
7 they claim that we somehow did something wrong in taking
8 into account adverse selection in identifying loans in
9 the course of our -- in UBS's due diligence.

10 And then FHA when it did its analysis, also
11 looked at perceived risks of loans in deciding which ones
12 to review.

13 Then, you know, HUD relied on third parties.
14 So did UBS in doing its due diligence. So --

15 THE COURT: Okay. So let me just try to
16 understand what you're saying. The first column is the
17 document, the public you've identified.

18 MR. GIUFFRA: Correct.

19 THE COURT: The second column are excerpts from
20 that document. The third column are the allegations in
21 the complaint, which you think those excerpts speak to.

22 MR. GIUFFRA: Correct.

23 THE COURT: Okay.

24 MR. GIUFFRA: And --

25 THE COURT: But this document -- this chart

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1 anyway, does not indicate what further you're seeking
2 that is relevant.

3 MR. GIUFFRA: No, and what we're seeking, your
4 Honor, and just -- I want to try to simplify this as much
5 as possibly can. We've gone through the public record in
6 the letter which I do believe is attached to your
7 materials, which is the May 7th letter, we identify
8 specific categories of documents, and specific human
9 beings who we think have documents that we think are
10 relevant --

11 THE COURT: Okay.

12 MR. GIUFFRA: -- allowing us to --

13 THE COURT: And did you meet and confer with
14 the government about those particular requests?

15 MR. GIUFFRA: Yes, we did.

16 MR. HAYES: Yes, we know that they want
17 documents from Timothy Geithner, your Honor.

18 THE COURT: Okay.

19 MR. HAYES: And, your Honor, again what this
20 seems to be is laying a foundation for trial. And
21 there's no answer in this case. There's no articulated
22 defense. You've heard suggestions about causation.
23 There's no cases.

24 But in any event, this seems to be a question
25 of the government knew that Countrywide or who knows how

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1 many other originators, was a bad originator, or believed
2 that it was a good originator.

3 This is something that UBS doesn't know one way
4 or the other about, and it sounds like it's an estoppel
5 argument ultimately. The government can't bring this
6 case and seek penalties that would go to the Treasury,
7 your Honor -- fair enough, that's like a criminal file.
8 But the government can't bring a case against UBS because
9 some component thought that Countrywide was okay. And I
10 might add, well if that's okay, then let's bring out the
11 2012 national mortgage settlement in which the government
12 obtained \$1 billion in damages under the False Claims Act
13 and Consumer Relief, and the August 2014 global
14 settlement of claims against Bank of America which
15 included Countrywide, and which the government obtained
16 well over another billion dollars in damages against
17 Countrywide.

18 So the government was a victim, and brought
19 cases or resolved prospective cases concerning that. And
20 none of that has anything to do with UBS at all, and the
21 representations that it made -- that it made to investors
22 about these loans in the forty deals at issue in this
23 case.

24 MR. GIUFFRA: Your Honor, I think it's
25 directly --

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1 THE COURT: Well, I --

2 MR. HAYES: Timothy Geithner knows nothing
3 about any of this.

4 MR. HAYES: Your Honor, if that's --

5 THE COURT: Okay, so let me -- before going
6 forward, so I don't think I have enough information today
7 to make a decision, and there are two things at issue
8 here. So I am going to ask for further briefing, okay?
9 So the first question is this executive branch discovery
10 issue which as I've noted, I haven't found any case law,
11 the parties haven't given -- haven't found much case law
12 in this area, if you want me to make a decision on that,
13 then you should tell me more and giving me arguments and
14 citations on that issue.

15 The second point are the specifics of what's
16 being requested here. So if the defendant is asking for
17 specific -- defendants rather, are asking for specific
18 types of documents, then I want to know what those are,
19 and what the relevance is, all right?

20 MR. GIUFFRA: We will do that.

21 THE COURT: And I would urge the parties to
22 meet and confer specifically on those things, so that
23 there's no question about whether these are examples or
24 the actual requests. So the fact that the parties came
25 in here today, not even sure about that point, is

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1 troubling to me, okay?

2 So that means that you haven't really
3 adequately met and conferred if it's still ambiguous,
4 whether you're citing examples or you're saying that
5 these are, in fact, the requests. So this is an example
6 from my mind, of why the parties aren't communicating
7 well. Okay?

8 So I want you to meet and be clear about what
9 exactly you're looking for, and then I will allow you to
10 make your relevance argument, and then there can be a
11 proportionality argument because one of the defenses to
12 the subpoena is that there's an undue burden, and so that
13 may be one of the reasons in addition to what Mr. Giuffra
14 mentioned at the outset for why you would prefer to have
15 a Rule 34 discovery, as opposed to a subpoena.

16 On the other hand, the Federal Rules of Civil
17 Procedure were recently amended to require a
18 proportionality analysis by the Court. And so I will
19 permit or I would request that the parties give me enough
20 information as to the need for that information, versus
21 the burden, okay?

22 I don't know how long this is going to be
23 because there's going to be a lot of particular -- it
24 seems from the outset like there are a lot of documents,
25 and so I may regret this but I am not going to put a page

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1 limit on it, but I am going to say that it doesn't do the
2 parties any good to go on, and on, and repeat.

3 So if you've got specific requests, and I don't
4 want you to remove margins from pages, and so I will just
5 let you use your good judgment in terms of how much you
6 need to make your argument, get in and get out. All
7 right?

8 Because if you go on and on, you're likely to
9 talk me out of ruling in your favor, all right? But I
10 will allow you to go on -- to use more than the normal
11 number of pages because there may be many requests that
12 you need to make, all right? And if there are similar
13 arguments, you can just say same argument as before, but
14 I do want to point out that because there has been no
15 answer in this case, it is going to be a little bit
16 difficult for me to really argue -- to see the relevance,
17 and so it may be we're putting the cart before the horse,
18 and we may end up making -- having these discussions
19 about whether estoppel would be a valid answer.

20 So if there had been answer already filed,
21 there could have been a motion to strike affirmative
22 defenses, and things like that and so we may end up
23 getting into those discussions as part of whether it's
24 relevant, right? Because if a particular defense is not
25 permitted, and it would be stricken in the normal course,

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1 then by virtue of that, whatever is needed for that
2 defense would be irrelevant.

3 So I fear that all of this is getting a little
4 bit mushy but I just put it out there to let you know of
5 some of the difficulties that I may encounter in
6 assessing what you present to me.

7 So, Mr. Giuffra, if you want to show your hand
8 a little bit, and state what some of those affirmative
9 defenses are as you say why something is relevant, that
10 may be helpful, as well. All right?

11 MR. GIUFFRA: We can easily do that, your
12 Honor.

13 THE COURT: Okay. So --

14 MR. GIUFFRA: And what we will do, as we
15 endeavor to do in the document I handed up, we will
16 literally cite paragraphs of the complaint, and show why
17 we think specific documents are relevant. We'll try to
18 do -- we think this should be done in two weeks because
19 we're actually concerned about the spoliation issue
20 because we've been going back and forth on this for a
21 number of months.

22 THE COURT: All right. So I will put some
23 deadlines on this.

24 MR. HAYES: And your Honor -- and as your Honor
25 looks for a date, the government asks whether this -- we

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1 presume that this is the case but whether this would
2 follow the usual course as outlined in the Court's rule
3 where UBS would submit something. The government would
4 respond. And then that would be it.

5 THE COURT: I think since we have thrashed out
6 this issue that may be all that's necessary here, and
7 like I said, I'm not putting page limits on it, so make
8 your best arguments, get in and get out.

9 MR. HAYES: And no reply, your Honor.

10 MR. GIUFFRA: Well, the only thing I am
11 concerned about, your Honor --

12 THE COURT: Well --

13 MR. GIUFFRA: -- is in terms of the -- you
14 raised two issues; one is the relevance issue, which is
15 we'll give you a document which will explain the
16 relevance. I presume we do it in a chart format.

17 THE COURT: All right. So then this is what I
18 will do. I will permit -- again, this will be a little
19 bit out of my normal procedure, I will put a deadline for
20 the motion, which will be the motion to -- fully-briefed
21 motion to compel, which like I said, will have the two
22 parts, the executive branch discovery, and the relevance
23 as to specific requests.

24 I will put down a deadline for a response. I
25 will allow a reply, and I will allow a surreply. And

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1 then that's it. So everybody gets two chances.

2 MR. HAYES: Thank you, Judge.

3 THE COURT: All right. So that will clear up
4 any ambiguities about who is allowed to file what, when.

5 So Mr. Giuffra, you said you'll file yours in
6 two weeks, which will be July 15th. Mr. Hayes, how much
7 time do you need?

8 MR. HAYES: Two weeks, your Honor.

9 THE COURT: All right. And that will be July
10 29. And then after that?

11 MR. GIUFFRA: One week, your Honor.

12 THE COURT: July -- oops, now we're getting
13 into August.

14 MR. GIUFFRA: Unless it's on a Saturday or
15 Sunday?

16 THE COURT: No, it's one week --

17 MR. GIUFFRA: It wouldn't be. We'll be okay.

18 THE COURT: One week --

19 MR. HAYES: One week from a weekday.

20 THE COURT: -- from a weekday is always a
21 weekday.

22 MR. GIUFFRA: Is always going to be a weekday,
23 so it will fine.

24 THE COURT: August 5th.

25 MR. GIUFFRA: And then the 12th.

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1 THE COURT: And then August 12th.

2 MR. HAYES: Thank you, Judge.

3 THE COURT: All right. So I urge everybody to
4 be working -- moving expeditiously. I see that there may
5 be a large volume, but I trust that everybody has already
6 gotten a good sense of what is at issue here, so the time
7 for you to file these papers should not -- this should
8 give everybody enough time, and I also think given that
9 you've all agreed to these dates, that there won't be any
10 vacations or other things that get in the way.

11 So I will have this all fully briefed by August
12 12th, and I will look at it and see how long it takes for
13 me to come up with something. I will try to move
14 quickly. I can't guarantee I will send it to you by the
15 end of August, but I will do my best, and if not, then
16 certainly, I will get it to you by September, okay?

17 MR. HAYES: Thank you, your Honor. And, your
18 Honor, the government has one additional thought.

19 THE COURT: Okay.

20 MR. HAYES: There was another case in this
21 district, the case United States v. Barclays before Judge
22 Matsumoto, and before Magistrate Judge Orenstein. There
23 was discovery in that case, and one of the things that
24 the magistrate judge felt would be appropriate and help
25 set the table and provide structure for the discovery,

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1 was to require Barclays to file an answer statement. The
2 government refers your Honor to the docket in that case
3 for possible consideration in this case.

4 THE COURT: Okay, thank you. It is sort of
5 what I alluded to in my statement to Mr. Giuffra, that in
6 making your arguments as to relevance, you may have to
7 tip your hand and say what your answers will be.

8 MR. GIUFFRA: Fine, your Honor.

9 THE COURT: Would you prefer to make a
10 statement of your answer?

11 MR. GIUFFRA: No, I think we would like to wait
12 because we have a fully briefed motion to dismiss. I'm
13 happy to give the Court a copy of everyone's briefs.

14 THE COURT: I can get it on the docket.

15 MR. GIUFFRA: Yeah. And I think it's --

16 THE COURT: Although if you have a copy, maybe
17 a courtesy copy would be useful.

18 MR. GIUFFRA: Do we have a copy?

19 MR. DECAMP: Yes.

20 MR. HAYES: There was a motion to dismiss
21 pending in the Barclay's case at the time that Magistrate
22 Judge Orenstein made his ruling in that case, your Honor.

23 THE COURT: Okay, that's fine. All right. But
24 having a courtesy copy is useful.

25 MR. GIUFFRA: Well, your Honor, there's a

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1 difference that in the Barclay's case as I recall, there
2 were individuals named as defendants. There's no
3 individual named here.

4 THE COURT: All right. So I will have -- I
5 have access to the docket.

6 MR. GIUFFRA: And that's among other things --

7 THE COURT: So I will look it up, and it is
8 useful to me. Our judicial system functions well on
9 precedent. So having guidance, even if it's not binding,
10 having guidance from great minds who have considered this
11 issue before me would be helpful as I move forward.

12 All right. So I will look for those filings,
13 and reserve my decision until that point. If there's any
14 ambiguity, I will ask to have a brief conference to clear
15 things up with the parties but otherwise, I think what
16 you've provided me today, and what you will provide to me
17 in the papers should be sufficient.

18 MR. HAYES: And your Honor just because we're
19 here, procedurally we just want to let the Court know
20 that we've been complying as of course we must with the
21 Court's procedural orders. The parties have exchanged
22 interrogatories, the government has responded, UBS will
23 be responding to the government's interrogatories
24 shortly, and the parties have exchanged settlement
25 position letters.

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1 THE COURT: Okay. Great. And so you should
2 keep moving forward, and be mindful of whatever deadlines
3 may be looming. If you need extensions, I'm very
4 reasonable but you need to make the request in advance
5 and give me a good reason, all right?

6 Speaking of settlement, you should let me know
7 if at any point you think having a settlement conference
8 would be useful, but otherwise, does the government -- is
9 the government open to mediation in this case or --

10 THE COURT: We would be -- sometimes government
11 entities are not.

12 MR. HAYES: The United States is always willing
13 to engage in settlement negotiations, and certainly any
14 negotiations that would be assisted by the Court would be
15 welcome.

16 THE COURT: All right. So the parties should
17 confer and if you agree, because settlements are only
18 effective if there's agreement, if you agree, then I am
19 open to scheduling a settlement conference or making a
20 referral to the Court annexed mediation.

21 Is there anything else, Mr. Harris?

22 MR. HAYES: Nothing from the government, your
23 Honor.

24 THE COURT: Mr. Giuffra?

25 MR. GIUFFRA: Nothing from UBS, your Honor.

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1 THE COURT: All right.

2 MR. GIUFFRA: Thank you so much.

3 THE COURT: Thank you, everybody.

4 MR. HAYES: Good afternoon, your Honor.

5 (Matter concluded)

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5 **Defendants' Exhibits Marked for Identification:**

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **2nd** day of July, 2019.


Linda Ferrara

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